(27)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 442

ARON ROSENSWEIG AND ABE ROSENSWEIG,
Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

JOHN W. PRESTON,
Counsel for Petitioners.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Aron Rosensweig and Abe Rosensweig, appellants below (R. 22-51, 123-137) respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above-entitled case (R. 137) on the 30th day of June, 1944. A rehearing was denied by that Court (R. 138) on the 2nd day of August, 1944, and the judgment of said Court is final.

Opinions Below.

The United States Circuit Court of Appeals for the Ninth Circuit rendered one opinion in the case (R. 125-

134), and Circuit Judge Mathews rendered an opinion concurring in the result (R. 135-136), which opinions are not yet reported.

Jurisdiction.

The judgment of the United States Circuit Court of Appeals for the Ninth Circuit was entered on the 30th day of June, 1944 (R. 137).

Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code of the United States as amended by the Act of February 13, 1925 (28 U. S. C. A. Section 347(a)).

Statutes and Regulations Involved.

The case involves the Emergency Price Control Act of 1942 (Act of January 20, 1942, 56 Stat. 23, 50 U. S. C. A. Appendix, Supp. II, Section 901, *et seq.*), as amended by the Act of October 2, 1942 (56 Stat. 765, 50 U. S. C. A. Appendix, Supp. II, Section 961, *et seq.*) and Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381) purporting to be issued thereunder on December 10, 1942.

Copies of applicable portions of the Emergency Price Control Act as amended and of Revised Maximum Price Regulation No. 169 are contained in the Appendix hereto.

Statement of the Case.

The petitioners seek a review of the judgment of the Circuit Court of Appeals for the Ninth Circuit (R. 137), which affirmed judgments of conviction against the petitioners in the District Court of the United States within and for the Central Division of the Southern District of California (R. 17-20) under an information (Count One) charging petitioners with making a sale of "one side of U. S. Grade A beef weighing 296 pounds" at a price in excess of the Maximum price prescribed under Revised

Maximum Price Regulation No. 169, as amended (R. 3-4).

The petitioners demurred to the information filed against them (R. 11-12) in the District Court upon the ground, *inter alia*, that said information failed to state facts sufficient to constitute an offense against the United States or the laws thereof, which demurrer was overruled (R. 14) and this action of the trial court was assigned as error in the Circuit Court of Appeals for the Ninth Circuit (R. 115-116).

The petitioners also assigned as error in the Circuit Court of Appeals the action of the trial court in refusing to adjudge that Revised Maximum Price Regulation No. 169 (7 Fed. Reg. No. 10381) as amended "is invalid because: (a) It wrongfully fails to establish maximum prices for livestock as an agricultural commodity" (R. 117, Assignment 7). In this connection the petitioners alleged that a side of beef is an agricultural commodity, and not a processed meat or product; that Section 3(e) of the Emergency Price Control Act of 1942 as amended requires the approval by the Secretary of Agriculture of all Price Regulations relating to agricultural commodities; that Revised Maximum Price Regulation No. 169 was not approved by the Secretary of Agriculture, or by the War Food Administrator, as required by the Act; and that said Regulation, lacking such approval, is void on its face, and hence that the information does not charge petitioners with an offense against the laws of the United States.

The Circuit Court of Appeals, in affirming the convictions, held that:

> "There is nothing on the face of the Regulation to indicate that the Secretary of Agriculture has not approved it, and there is no requirement that it appear on the face of the Regulation that such approval has been had. It may or may not have been approved, but that is not here pertinent for we are of the opinion that

appellants' claim that the Regulation did not become enforcible is no more than a claim that the Regulation is invalid. * * * The district court and this circuit court of appeals have no jurisdiction to consider the contention that the Regulation is invalid. Yakus v. United States, Case No. 374, decided by the Supreme Court March 27, 1944, — U. S. —" (R. 131).

The Questions Involved.

The principal questions here involved are:

1. Whether Section 204(d) of the Emergency Price Control Act of 1942 as amended (50 U. S. C. A. App. Section 924(d)) precludes a defendant from challenging by way of defense in a criminal prosecution the enforcibility of a Price Regulation that is void on its face because it was not approved by the Secretary of Agriculture as required by Section 3(e) of the Act (50 U. S. C. A. App. Section 903(e)).

2. Whether, if Section 204(d) of the Act (50 U. S. C. A. App. Section 924(d)) does not preclude such a challenge, the court below erred in affirming the judgments of conviction against the petitioners rendered by the district court (R. 17-20).

Specification of Errors.

1. The errors assigned in the court below (R. 115-119) and more especially Assignments Nos. 1, 4, 6 and 7, are relied on here.

2. The court below erred in holding that Section 204(d) of the Emergency Price Control Act (50 U. S. C. A. App. Section 924(d)) precluded petitioners by way of defense herein from challenging the enforcibility of Revised Maximum Price Regulation No. 169 (7 Fed. Reg. No. 10381) which, as to agricultural commodities, is void on its face.

3. The court below erred in holding that neither it nor the district court had jurisdiction to consider the enforci-

bility of Revised Maximum Price Regulation No. 169 (7 Fed. Reg. No. 10381) under Section 204(d) of the Emergency Price Control Act (50 U. S. C. A. App. Section 924(d)).

Reasons Relied on for the Allowance of the Writ.

The writ of certiorari herein prayed for should be allowed by this court for the following reasons:

1. The court below has decided an important question of federal law in a way probably in conflict with the applicable decisions of this Court.

2. The court below has decided an important question of federal law which has not been, but should be, settled by this Court.

3. The court below has incorrectly construed and applied the decision of this Court in *Yakus* v. *United States*, — U. S. —, 88 L. Ed. (Adv. Op.) 653, by holding that neither the court below nor the district court has jurisdiction to consider the enforcibility of Revised Maximum Price Regulation No. 169 (7 Fed. Reg. No. 10381) which, insofar as agricultural commodities are concerned, is void on its face.

4. This Court should clarify its decision in *Yakus* v. *United States*, — U. S. —, 88 L. Ed. (Adv. Op.) 653, by deciding whether Section 204(d) of the Emergency Price Control Act (50 U. S. C. A. App. Section 924(d)) precludes a defendant from challenging by way of defense to a criminal prosecution the enforcibility of a Price Regulation that is void on its face.

Wherefore, Petitioners pray that a writ of certiorari be issued by this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify to this Court for its review a transcript of

the record in case numbered and entitled on its docket 10,540, Aron Rosensweig and Abe Rosensweig *vs.* United States of America, and that the judgments of the Circuit Court of Appeals for the Ninth Circuit be reversed, and that petitioners have such other and further relief as may be proper.

JOHN W. PRESTON,
712 Rowan Building,
Los Angeles (13), California,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 442

ARON ROSENSWEIG AND ABE ROSENSWEIG,
Petitioners,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

A.

The decision of the United States Circuit Court of Appeals for the Ninth Circuit has not yet appeared in the Federal Reporter. It is to be found in the record (R. 125-134).

B.

The judgment of the Circuit Court of Appeals for the Ninth Circuit sought to be reviewed here was entered on June 30, 1944. Petition for rehearing was denied by said Circuit Court of Appeals on August 2, 1944.

C.

Statement of Facts.

Petitioners were convicted in the District Court of the Southern District of California under Count I of the Information which charged that they

> "* * * did knowingly, wilfully and unlawfully offer for sale, sell and deliver to E. E. Surhart * * * one side of U. S. Grade A beef weighing 296 pounds for the sum of $88.91, which side of U. S. Grade A beef weighing 296 pounds sold at a maximum price of $68.12 under the provisions of Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381 as amended, * * *" (R. 4).

From this judgment they appealed to the Circuit Court of Appeals for the Ninth Circuit (R. 22-31). The Circuit Court of Appeals affirmed the judgment of the District Court (R. 137).

Other facts are stated in the Petition for Certiorari, beginning on page 2, under the Caption "Statement of the Case."

D.

Assignments of Error.

The Court below erred:

(1) In holding that Section 204(d) of the Emergency Price Control Act of 1942 as amended (50 U. S. C. A. App. Section 924(d)) precluded petitioners by way of defense to the offense charged in Count I of the Information herein from challenging the enforcibility of Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381) which, as to agricultural commodities, is void on its face.

(2) In holding that neither the Court below nor the District Court had jurisdiction to consider the enforcibility of Revised Maximum Price Regulation No. 169 (7 Fed. Reg.

10381, under the facts of this case, because of the provisions of Section 204(d) of the Emergency Price Control Act of 1942 as amended (50 U. S. C. A. App. Section 924(d)).

E.

Summary of Argument.

The Circuit Court of Appeals for the Ninth Circuit erroneously held that it could not consider petitioners' claim that Revised Maximum Price Regulation No. 169 was not enforcible against them, under the facts of the case, because said Regulation had not been approved by the Secretary of Agriculture as required by Section 3(e) of the Emergency Price Control Act. Said Regulation is void on its face as to agricultural commodities, because not so approved. This Court, in the case of *Yakus* v. *United States*, — U. S. —, 88 L. Ed. (Adv. Op.) 653, expressly reserved for future decision the question whether one charged with the criminal violation of a price regulation may defend on the ground that the regulation is unconstitutional, or void, on its face (88 L. Ed. 672). Since it is well settled that a statute, which is unconstitutional, or void, on its face, is not enforcible and may be utterly disregarded, it follows that a mere administrative regulation or order which is unconstitutional, or void, on its face is likewise not enforcible. The violation of a void administrative regulation or order does not constitute an offense against the United States, or the laws thereof.

F.

Argument.

(a)

The Information Does Not Charge an Offense.

The offense alleged in Count I of the Information (the only Count here involved) was the sale by petitioners of a

side of beef weighing 296 pounds at a price above the maximum price fixed by Revised Maximum Price Regulation No. 169 (R. 4). A side of beef is not a processed product. (See *Commonwealth* v. *Clark*, 344 Pa. 155, 25 A. (2d) 143; *Florida Packing & Ice Co.* v. *Carney*, 51 Fla. 190, 41 So. 190, 192; *Kennedy* v. *State Board*, 224 Iowa 405, 276 N. W. 205, 206.) A side of beef is a beef carcass. (See Section 1364.477 of Revised Maximum Price Regulation No. 169.) A beef carcass is an agricultural commodity. (See cases cited, *supra*.)

Revised Maximum Price Regulation No. 169 was not approved by the Secretary of Agriculture, as required by Section 3(e) of the Emergency Price Control Act, hence said Regulation never became effective as to agricultural commodities. Section 3(e) of the Act provides:

> "Notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity *without the prior* approval of the Secretary of Agriculture * * *." (Italics ours.)

The power, functions and duties thus conferred on the Secretary of Agriculture were, by Executive Order No. 9328 (8 Fed. Reg. 4681), transferred to the War Food Administrator, to be thereafter exercised by him.

Revised Maximum Price Regulation No. 169, as published in the Federal Register shows on its face that it was not approved by the Secretary of Agriculture or by the War Food Administrator. Moreover, it affirmatively appears from the official proceedings of the Special Subcommittee of the House Committee on Agriculture that said Regulation was not approved by either of said officials, as required by Section 3(e) of the Act. (See Hearings

before Special Subcommittee of the House Committee on Agriculture, October 28, 1943: Specifically, the testimony of Richard B. Gilbert, Chief Economist of the Office of Price Administration.)

Regulation No. 169 Was Not Duly Promulgated.

It is manifest that the Price Administrator cannot lawfully promulgate a Regulation affecting agricultural commodities without the prior approval of the Secretary of Agriculture or the War Food Administrator. Section 3(e) of the Act, *supra*, so provides.

It should be noted that Regulation No. 169 is an act of administrative legislation, purported to be issued under a specific delegation of legislative power by the Congress to the Price Administrator *and* the Secretary of Agriculture insofar as agricultural commodities are concerned. The Regulation is analogous to an Act of Congress in certain material respects. It cannot be questioned that if a Bill is passed by the House of Representatives but is not passed by the Senate it never becomes law. Joint action or approval by both branches of the Congress is necessary to duly enact Congressional legislation. A like requirement is provided by Section 3(e) of the Act for the due promulgation of Price Regulations affecting agricultural commodities. That requirement is mandatory. Failure to comply with it, as to agricultural commodities, makes such regulations void and unenforcible. Since Regulation No. 169 was not approved, as required by Section 3(e) of the Act, it was not duly promulgated as to agricultural commodities and, therefore, is not enforcible against petitioners herein.

(b)

Petitioners Are Not Precluded by Section 204(d) of the Act from Challenging the Enforcibility of Regulation No. 169.

The court below held that petitioners' claim, that Revised Maximum Price Regulation No. 169 is not enforcible against them, is no more than a claim that the Regulation is invalid, and that such a claim could not be considered because of this Court's decision in *Yakus* v. *United States*, — U. S. —, 88 L. Ed. (Adv. Op.) 653. (See R. 131.) This holding of the court below amounts, in substance, to deciding that a Regulation void on its face must be enforced in a criminal prosecution for a violation thereof and that the trial court is without jurisdiction, right, or power to consider such invalidity as a defense in such prosecution. This, we believe, is an incorrect interpretation of this Court's decision in the *Yakus* case. Moreover, in its opinion in that case this Court expressly reserved for future decision the question whether one charged in a criminal prosecution with the violation of a Price Regulation may defend on the ground that such Regulation is unconstitutional, or void, on its face. (See 88 L. Ed. 672.) The question there reserved for future decision is squarely presented herein and should now be settled by this Court.

It may be observed that if a Regulation is void on its face, there is nothing left for adjudication by recourse to the procedure prescribed by Sections 203 and 204 of the Act. It is, we think, apparent that the Congress intended that the procedure there prescribed should be followed only in cases where issues of fact, or law, or both law and fact, must be adjudicated. Such issues are wholly lacking here, and hence no such adjudication is necessary.

If the district court cannot judicially notice that a Price Regulation is void on its face, then it logically follows that a *void* Regulation must be treated, construed and enforced as valid, even to the extent of imposing criminal punishment, because its invalidity was not adjudicated under the protest procedure prescribed by Sections 203 and 204 of the Act. The effect of so holding would be to supply the approval, by the Secretary of Agriculture, of a Regulation which shows on its face that it was not approved by him; and this in turn would result in nullifying the provisions of Section 3(e) of the Act. No such absurd results could have been contemplated by the Congress in setting up the procedure prescribed by Section 204(d) of the Act, for obviously Congress would not require an adjudication of invalidity where invalidity clearly appears on the face of the Regulation and is not in issue.

It is not necessary to comply with the provisions of an administrative order which is void on its face.

It is apparent, without argument, that an administrative order cannot impose duties, obligations and penalties more binding than those imposed by a statute. It is well settled that a void statute is unenforcible and may be utterly disregarded. (See 11 Am. Jur. pp. 827, 828, Section 148; 16 C. J. S. 287, et seq., Section 101; *Norton* v. *Shelby County*, 118 U. S. 425, 442, 30 L. Ed. 178, 6 S. Ct. 1121; Ex parte Siebold, 100 U. S. 371, 376, 25 L. Ed. 717, 719; *Chicago, I. L. R. Co.* v. *Hackett*, 228 U. S. 559, 566, 57 L. Ed. 966, 969.)

The rule here applicable is stated in *11 Am. Jur.* 827, supra, as follows:

> "The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and in legal contemplation is as inoperative as if it had never been passed."

This statement of the rule is in accord with the decisions of this Court, supra. In *Chicago, I. L. R. Co.* v. *Hackett*, 228 U. S. 559, 566; 57 L. Ed. 966, 969, supra, this Court said:

> "That act was therefore as inoperative as if it had never been passed, for an unconstitutional act is not a law and can neither confer a right or immunity nor operate to supersede any existing valid law. (Citing cases.)"

Analogous and to the same general effect are: Ex parte Young, 209 U. S. 123, 146, 28 S. Ct. 441, 52 L. Ed. 714; *Stafford* v. *Wallace*, 258 U. S. 495, 42 S. Ct. 397, 400, 66 L. Ed. 735; *Terrace* v. *Thompson*, 263 U. S. 197, 215, 44 S. Ct. 15, 18, 68 L. Ed. 255; *Tyson & Brother etc. Offices* v. *Banton*, 273 U. S. 418, 428, 47 S. Ct. 426, 427, 71 L. Ed. 718; *Wallace* v. *Currin* (4 Cir.) 95 F. (2d) 856, 861.

The Regulation here challenged is not sacrosanct because issued by an administrative officer. It must be measured by the same standards that apply to statutes, and certainly can have no greater force and effect. As already stated, a statute which has been passed by only one of the two branches of Congress is utterly void, may be disregarded, and is unenforcible. Regulation No. 169, as to agricultural commodities, is in the same category, for the same reasons.

Courts cannot be required to enforce unconstitutional or void statutes or unconstitutional or void administrative orders.

Implicit in the rule that an unconstitutional or void statute is inoperative and unenforcible, as stated in the texts and decisions above cited, is the principle that the courts cannot be required to enforce such a statute. The same rule is applicable to an unconstitutional or void administrative order or regulation, and has ample support

in both reason and authority. (See 6 R. C. L. 117, 118, Section 117; 11 Am. Jur. 827, 829, Section 148; *Chicago, I. L. R. Co.* v. *Hackett*, supra; *United States* v. *Realty Co.*, 163 U. S. 427, 16 S. Ct. 1120, 41 L. Ed. 215; *Hammond* v. *Clark*, 136 Ga. 313, 71 S. E. 479; *Anderson* v. *Lehmkuhl*, 119 Neb. 451, 229 N. W. 773; *State* v. *Williams*, 146 N. C. 618, 61 S. E. 61.) The rule extends to criminal cases (Ibid.), and as to such cases is thus stated in 6 R. C. L. 119:

> "It has been decided that an offense created by an unconstitutional law is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment, and the courts must liberate a person imprisoned under it just as if there had never been the form of a trial, conviction and sentence."

See, Ex parte Siebold, supra; *State* v. *Williams*, supra; Ex parte Hollman, 79 S. C. 9, 60 S. E. 19; Ex parte Bornee, 76 W. Va. 360, 85 S. E. 529; *Kelley* v. *Meyers*, 124 Or. 322, 263 Pac. 903, 56 A. L. R. 661.

Nor can the courts make a statute valid that is invalid on its face, and this is likewise true as to an invalid administrative order or regulation.

Conclusion.

Wherefore, it is submitted that the writ of certiorari prayed for in the petition herein should be granted, and the judgment of the court below should be reversed.

Respectfully submitted,

JOHN W. PRESTON,
712 Rowan Building,
Los Angeles 13, California,
Counsel for Petitioners.

APPENDIX

APPENDIX.

EMERGENCY PRICE CONTROL ACT OF 1942.

For the convenience of the Court, Section 3 of the Act (50 U. S. C. A. App. Section 903) is set out in full as follows:

"Sec. 3. (a) No maximum price shall be established or maintained for any agricultural commodity below the highest of any of the following prices, as determined and published by the Secretary of Agriculture: (1) 110 per centum of the parity price for such commodity, adjusted by the Secretary of Agriculture for grade, location and seasonal differentials, or, in case a comparable price has been determined for such commodity under subsection (b), 110 per centum of such comparable price, adjusted in the same manner, in lieu of 110 per centum of the parity price so adjusted; (2) the market price prevailing for such commodity on October 1, 1941; (3) the market price prevailing for such commodity on December 15, 1941; or (4) the average price for such commodity during the period July 1, 1919, to June 30, 1929.

(b) For the purposes of this Act, parity prices shall be determined and published by the Secretary of Agriculture as authorized by law. In the case of any agricultural commodity other than the basic crops corn, wheat, cotton, rice, tobacco, and peanuts, the Secretary shall determine and publish a comparable price whenever he finds, after investigation and public hearing, that the production and consumption of such commodity has so changed in extent or character since the base period as to result in a price out of line with parity prices for basic commodities.

(c) No maximum price shall be established or maintained for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to producers of such agricultural commodity a price for such agricultural commodity equal to the highest price therefor specified in subsection (a).

(d) Nothing contained in this Act shall be construed to modify, repeal, supersede, or affect the provisions of the Agricultural Marketing Agreement Act of 1937, as amended, or to invalidate any marketing agreement, license, or order, or any provision thereof or amendment thereto, heretofore or hereafter made or issued under the provisions of such Act.

(e) Notwithstanding any other provisions of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture; except that the Administrator may take such action as may be necessary under section 202 and section 205 (a) and (b) to enforce compliance with any regulation, order, price schedule or other requirement with respect to an agricultural commodity which has been previously approved by the Secretary of Agriculture.

(f) No provision of this Act or of any existing law shall be construed to authorize any action contrary to the provisions and purposes of this section."

REVISED MAXIMUM PRICE REGULATION No. 169.

For the convenience of the Court, Section 1364.455(a) (8) and (9) and Section 1364.477 (3) of Revised Maximum Price Regulation No. 169, as in effect at the date of the offense alleged in the Information, are set out in full as follows:

"Sec. 1364.455. *Definitions applicable to beef.* (a) When used in this Revised Maximum Price Regulation No. 169 and when applicable to beef, the term: (Subsections (1) to (7) omitted).

"(8) 'Beef carcass' means and is limited to the dressed carcass, side, or sides of beef, which shall be dressed with the 1st and 2nd tail (caudal) vertebrae, kidney knob or knobs and hanging tender left on. The beef carcass shall not be broken in any other manner than provided in paragraph (a) (9) of this Sec. 1364.455.

"(9) 'Beef wholesale cut' means and is limited to any of the following cuts meeting the following minimum specifications, derived from the beef carcass, but excluding the offal and any item not included herein. (All measurements prescribed herein shall be made with a rigid straight ruler. All cuts shall be made according to the definite guides and measurements specified. Ribs are designated as 1st to 13th, inclusive, counting as the 1st rib that one which is nearest the neck end of the side.)

"Sec. 1364.477. *Definitions applicable to processed products.* (a) When used in this Revised Maximum Price Regulation No. 169 and when applicable to processed products the term: (Subsections (1) and (2) omitted.)

"(3) 'Processed products' means ground, cured, pickled, spiced, smoked, dried or otherwise processed beef and/or veal, including ground hamburger and sausage containing any proportion of beef or veal: *Provided,* That any beef carcass, or cut thereof, including any beef wholesale cut which has been boned as permitted in subpart B of this Revised Regulation or otherwise, or any veal carcass, or cut thereof, including any veal wholesale cut which has been boned as permitted in subpart C of this Revised Regulation or otherwise shall not be deemed a processed product. Products of each grade and brand, and in each stage of processing, shall be considered separate processed products. Each type of canned and packaged meat, made entirely from beef and/or veal shall be considered a separate processed product. Kosher processed products shall for the purposes of Sec. 1364.476 be regarded as separate processed products."

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 442

ARON ROSENSWEIG AND ABE ROSENSWEIG,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was filed by the District Court. The opinion of the Circuit Court of Appeals for the Ninth Circuit is not yet officially reported, but is set forth at pages 125–136, 138 of the Record.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 30, 1944 (R. 137). A petition for rehearing was denied on August 2, 1944 (R. 138). The petition for a writ of certiorari

was filed in this Court on September 7, 1944. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATUTE AND REGULATION INVOLVED

The case involves the Emergency Price Control Act of 1942, 56 Stat. 23, 50 U. S. C. App. 901 et seq., as amended by the Act of October 2, 1942, 56 Stat. 765, 50 U. S. C. App. Supp. II, Sec. 961; and Revised Maximum Price Regulation No. 169 (7 F. R. 10381). The pertinent provisions of the Act and of the Regulation are set forth in the Appendix, *infra*, pp. 12–21.

QUESTION PRESENTED

Whether the claim that a maximum price regulation is defective for asserted failure to comply with the requirement of the Act that no maximum prices be established for any "agricultural commodity" without the prior approval of the Secretary of Agriculture, presents the question of "whether one charged with criminal violation of a duly promulgated price regulation may defend on the ground that the regulation is unconstitutional on its face," reserved in *Yakus* v. *United States*, 321 U. S. 414, 446–447.

STATEMENT

The petitioners were convicted in the District Court for the Southern District of California (R. 17–20) under an information filed on July 15,

1943 (R. 2) pursuant to Section 205 (b) of the Act. The information charged the petitioners individually with wilfully making wholesale sales of processed meats—sides of beef and other meat products—at prices in excess of those permitted by the applicable maximum price regulations issued pursuant to the Act. the information was in six counts; counts 1–5 alleged violations of Revised Maximum Price Regulation No. 169 (7 F. R. 10381), and count 6 charged violations of Revised Maximum Price Regulation No. 148 (7 F. R. 8609). Count 1 charged the sale of a wholesale cut of beef at a price in excess of the maximum legal price. Counts 2–6 charged similar sales and sales of other meat products at unlawful prices through the device of entering the ceiling price on the invoice slip, and then demanding and receiving a "side payment" in excess of the ceiling price.

The defendants jointly filed a demurrer (R. 11–13) and motion to quash (R. 54–56) raising issues of law, and, in particular, attacking the validity of the Act and the Regulations.[1] The District Court overruled the demurrer and motion on August 2, 1943, whereupon the defendants entered pleas of not guilty to all counts of the information (R. 14, 56).

On August 11, 1943, the defendants changed their pleas from not guilty and entered pleas of

[1] Defendant Abe Rosensweig filed a separate plea in abatement which was overruled (R. 56).

guilty to counts 1 and 3 (R. 15, 56–67). Counts 2, 4, 5, and 6 were subsequently dismissed (R. 15, 18, 50, 63).[2] Judgments were entered on August 30, 1943 (R. 17–20). Defendant Aron Rosensweig was sentenced to imprisonment for 30 days and to pay a fine of $1,000 (R. 17, 61). Defendant Abe Rosensweig was fined $1,000, and the imposition of further sentence was suspended and the defendant placed on probation for two years on condition that during that period he should not wilfully violate any price regulations issued under the Act (R. 19, 61).

Counsel for defendants objected to the sentences as too severe, describing an alleged understanding with the United States Attorney's Office concerning the sentences which were to have been recommended to the court by the Probation Officer (R. 61–62). The district court, after a hearing, refused to modify the judgments and denied a motion by defendants to vacate the judgments, for permission to withdraw their pleas of guilty and to reenter their pleas of not guilty, and for a new trial (R. 21–22, 64, 106). The defendants were admitted to bail and a stay of execution was granted (R. 34).

The defendants appealed from the judgments entered on their pleas of guilty (R. 22, 27). They urged two points in the circuit court of appeals:

[2] The dismissal of count 6 eliminated Revised Maximum Price Regulation No. 148 from the case.

(1) that the information was defective because the Regulation "never became effective" owing to the asserted lack of prior approval of the Secretary of Agriculture, such approval being required by Section 3 (e) of the Act prior to the establishment of maximum prices for "any agricultural commodity," the defendants contended that a side of beef, the commodity which they were charged with having sold at unlawful prices, is an "agricultural commodity;" and not a product processed from an agricultural commodity (R. 128–129); and (2) that the district court erred in refusing to vacate the judgments entered upon the pleas of guilty and permit the reentry of pleas of not guilty in view of alleged promises made to the defendants by the United States Attorney concerning the sentences which were to have been recommended to the court by the Probation Officer (R. 132–133).[3] The circuit court of appeals affirmed the judgments on June 30, 1944 (R. 137). It held (1) that the defendants' claim that the Regulation was unenforcible for alleged lack of prior ap-

[3] The Circuit Court of Appeals treated the appeals as also raising issues directed to the order denying defendants' motion to vacate the judgments, although the notices of appeal were addressed solely to the judgments themselves (R. 125–136). The instant Petition does not specifically bring forward any question as to the ruling on the motion to vacate or as to the alleged understanding with the United States Attorney regarding the sentences. See fn. 5, p. 10, *infra*. Other points assigned as error by the defendants in connection with the appeal were not pressed in the Circuit Court of Appeals (R. 115–119, 126).

proval by the Secretary of Agriculture constituted an attack on the validity of the Regulation and was consequently barred under the authority of *Yakus* v. *United States*, 321 U. S. 414 (R. 128–132, 136); and (2) that the District Court had committed no error in the imposition of sentence and in refusing to vacate the judgments (R. 132–134). On the latter point there was a concurring opinion (R. 135–136).

ARGUMENT

1. Petitioners are incorrect in their contention that this case presents the question reserved in *Yakus* v. *United States*, 321 U. S. 414, 446, whether "one charged with criminal violation of a duly promulgated price regulation may defend on the ground that the regulation is unconstitutional on its face." Petitioners' attack upon Revised Maximum Price Regulation No. 169 is not pitched upon any constitutional ground, but upon the ground that the Regulation fails to comply with a statutory condition governing the Price Administrator's authority to establish maximum prices. Nor can it be sensibly urged—assuming that the question would be pertinent under the foregoing reservation of the *Yakus* decision—that the Regulation has not been "duly promulgated" because of the asserted lack of prior approval by the Secretary of Agriculture. The statutory requirement of such prior approval constitutes a legislative standard substantive in character. It

expresses a special Congressional solicitude for the peculiar interests of the agricultural producer. *E. g.*, 88 Cong. Rec. 160, 77th Cong., 2d sess. The significance of this statutory requirement, then, is not that of a technical incident in the formal process of "promulgation" of price regulations. Moreover, in any case where the applicability of the requirement of prior approval might raise a substantial question, the determination of the meaning of "agricultural commodity" would be a highly appropriate matter for the uniform administrative consideration called for by section 204 (d). The application of excise tax and tariff classifications is a pertinent reminder in this regard. Cf. *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492.

2. While petitioners' attack on the Regulation accordingly presents no feature suggesting the question reserved in the *Yakus* decision, the Government desires to state for the information of the Court that Revised Maximum Price Regulation No. 169 was in fact issued without prior approval of the Secretary of Agriculture, for the reason that the statutory requirement of such approval was plainly inapplicable. By the same token petitioners' claim of prejudicial error is unsubstantial.

The Secretary's approval, as stated above, is required in connection with the establishment of prices for "any agricultural commodity." The

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requirement does not extend to products processed from agricultural commodities. This essential distinction pervades the entire statutory plan with respect to the regulation of prices of farm products. Compare Sections 3 (a) and 3 (b), which deal with the subject of parity prices and refer only to agricultural commodities, with Section 3 (c), which explicitly provides that the producers of agricultural commodities shall obtain parity prices and that the prices established for commodities processed or manufactured therefrom shall not be below certain designated prices (Appendix, *infra,* pp. 14–15). Compare also Section 3 of the Act of October 2, 1942, where the same distinction appears (Appendix, *infra,* pp. 17–19).

The legislative history of Section 3 (e) permits of no doubt as to the intent of Congress that the requirement of prior approval by the Secretary of Agriculture should not be applicable in the establishment of maximum prices for products processed from agricultural commodities. In its original form, as first proposed by Senator Bankhead, the section read as follows:

> Notwithstanding any other provision of law, no action shall be taken by the Administrator or any other person with respect to an agricultural commodity *or commodity processed or manufactured in whole or in substantial part from any agricultural commodity* without the prior approval of the Secretary of Agriculture. [Emphasis supplied.]

Thereafter Senator Bankhead sponsored an amendment striking from the section the provisions relating to commodities "processed or manufactured * * * from any agricultural commodity." Senator Bankhead explained (88 Cong. Rec. 160, 77th Cong., 2d sess.):

> In addition to agricultural commodities, the original amendment included commodities processed or manufactured in whole or in substantial part from any agricultural commodity * * * of course, we have no desire to have the amendment cover anything but products dealt with by the Department of Agriculture and in the production and price of which the farmer, the agricultural producer, has a direct, immediate, primary interest. * * * so now the amendment is brought right down to agricultural commodities.

Other Senators recognized and approved the distinction.[4]

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[4] Senator McNary. Mr. President, I know from reading the bill that any fair-minded person must come to the conclusion that the words "agricultural commodity" refer to the raw materials produced on the farm. Otherwise, there would not be a separate subsection dealing with processed and manufactured goods. The two subsections, read together, define the term.

* * * * *

When we want to enter the field of refined, manufactured, or processed commodities, we use the proper language [88 Cong. Rec. 182, 77th Cong., 2d sess., 1942].

Senator Overton. When the Bankhead amendment refers to agricultural commodities it refers solely to raw agri-

Live cattle are agricultural commodities. When they are slaughtered and their carcasses dressed a processed product results. Petitioners in contending that beef carcasses are agricultural commodities place reliance upon the definition of "processed products" contained in Section 1364.477 (3) of Revised Price Regulation No. 169 (See Appendix, *infra,* p. 21). That definition has no pertinence here, where the issue is not as to the meaning of the term "processed products" as used in the internal scheme of the Regulation, but as to the basic distinction between "agricultural commodities" and products processed from agricultural commodities as that distinction is found in the statute. The Regulation prescribes maximum prices for (1) beef carcasses and wholesale cuts; (2) veal carcasses and wholesale cuts; and (3) processed products. All of these products, including carcasses and wholesale cuts, are products processed from agricultural commodities; the

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cultural commodities. It does not refer to processed agricultural commodities or commodities manufactured in whole or in substantial part from agricultural commodities (*Id.*, p. 173).

Senator GEORGE. As I understand, the amendment applies strictly to agricultural products, and not to processed or manufactured articles made from manufactured products (*Id.*, p. 180).

third group consists of products processed from the first two.[5]

CONCLUSION

The decision below is correct and presents no question meriting review by this Court. The petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

THOMAS I. EMERSON,
Deputy Administrator,

FLEMING JAMES, JR.,

ABRAHAM GLASSER,
Office of Price Administration.

OCTOBER 1944.

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[5] Other questions which may be latent in the petition in view of petitioners' adoption by reference of their assignments of error in the circuit court of appeals (Pet. p. 4) are apparently not pressed by petitioners; certain constitutional objections are stated by the court below to have been abandoned there (R. 126).

APPENDIX

The pertinent provisions of the Emergency Price Control Act of 1942, 56 Stat. 23, are as follows:

> SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production,

distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee

may make such recommendations to the Administrator as it deems advisable. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection.

SEC. 3. (a) No maximum price shall be established or maintained for any agricultural commodity below the highest of any of the following prices, as determined and published by the Secretary of Agriculture: (1) 110 per centum of the parity price for such commodity, adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials, or, in case a comparable price has been determined for such commodity under subsection (b), 110 per centum of such comparable price, adjusted in the same manner, in lieu of 110 per centum of the parity price so adjusted; (2) the market price prevailing for such commodity on October 1, 1941; (3) the market price prevailing for such commodity on December 15, 1941; or (4) the average price for such commodity during the period July 1, 1919, to June 30, 1929.

(b) For the purposes of this Act, parity prices shall be determined and published by

the Secretary of Agriculture as authorized by law. In the case of any agricultural commodity other than the basic crops corn, wheat, cotton, rice, tobacco, and peanuts, the Secretary shall determine and publish a comparable price whenever he finds, after investigation and public hearing, that the production and consumption of such commodity has so changed in extent or character since the base period as to result in a price out of line with parity prices for basic commodities.

(c) No maximum price shall be established or maintained for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to producers of such agricultural commodity a price for such agricultural commodity equal to the highest price therefor specified in subsection (a).

* * * * *

(e) Notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture; except that the Administrator may take such action as may be necessary under section 202 and section 205 (a) and (b) to enforce compliance with any regulation, order, price schedule or other requirement with respect to an agricultural commodity which has been previously approved by the Secretary of Agriculture.

SEC. 204. (d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of

Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C. 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

SEC. 205. (b) Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to

a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

The pertinent provisions of the Act of October 2, 1942, 56 Stat. 765, are as follows:

SEC. 3. No maximum price shall be established or maintained for any agricultural commodity under authority of this Act or otherwise below a price which will reflect to producers of agricultural commodities the higher of the following prices, as determined and published by the Secretary of Agriculture—

(1) The parity price for such commodity (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials) or, in case a comparable price has been determined for such commodity under and in accordance with the provisions of section 3 (b) of the Emergency Price Control Act of 1942, such comparable price (adjusted in the same manner), or

(2) The highest price received by such producers for such commodity between January 1, 1942, and September 15, 1942 (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials), or, if the market for such commodity was inactive during the latter half of such period, a price for the commodity determined by the Secretary of Agriculture to

be in line with the prices, during such period, of other agricultural commodities produced for the same general use;

and no maximum price shall be established or maintained under authority of this Act or otherwise for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to the producers of such agricultural commodity a price therefor equal to the higher of the prices specified in clauses (1) and (2) of this section: *Provided,* That the President may, without regard to the limitation contained in clause (2), adjust any such maximum price to the extent that he finds necessary to correct gross inequities; but nothing in this section shall be construed to permit the establishment in any case of a maximum price below a price which will reflect to the producers of any agricultural commodity the price therefor specified in clause (1) of this section: *Provided further,* That modifications shall be made in maximum prices established for any agricultural commodity and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, under regulations to be prescribed by the President, in any case where it appears that such modification is necessary to increase the production of such commodity for war purposes, or where by reason of increased labor or other costs to the producers of such agricultural commodity incurred since January 1, 1941, the maximum prices so established will not reflect such increased costs: *Provided further,* That in the fixing of maximum prices on products resulting from the processing of agricultural commodities, in-

cluding livestock, a generally fair and equitable margin shall be allowed for such processing: *Provided further,* That in fixing price maximums for agricultural commodities and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, as provided for by this Act, adequate weighting shall be given to farm labor.

The pertinent provisions of Revised Maximum Price Regulation No. 169 (7 F. R. 10381 as amended March 30, 1943, 8 F. R. 4097) are as follows:

SUBPART A—GENERAL PROVISIONS

§ 1364.401 *Prohibition against selling beef and veal carcasses and wholesale cuts, and processed products at prices above the maximum*—(a) *Beef carcasses and wholesale cuts.* On and after December 16, 1942, regardless of any contract, agreement, or other obligation no person shall sell or deliver any beef carcass or beef wholesale cut, and no person shall buy or receive any beef carcass or beef wholesale cut at a price higher than the maximum price permitted by § 1364.451; and no person shall agree, offer, solicit, or attempt to do any of the foregoing. The provisions of this Revised Maximum Price Regulation No. 169 shall not be applicable to sales or deliveries of beef carcasses or beef wholesale cuts to a purchaser, if, prior to December 10, 1942, such beef carcasses or beef wholesale cuts, have been received by a carrier other than a carrier owned or controlled by the seller, for shipment to such purchaser. "Person," "beef carcass," and "beef wholesale cut" are defined in § 1364.455.

(b) *Veal carcasses and wholesale cuts.* On or after April 3, 1943, regardless of any contract, agreement, or other obligation, no person shall sell or deliver any veal carcass or veal wholesale cut and no person shall buy or receive any veal carcass or veal wholesale cut at a price higher than the maximum price permitted by § 1364.466, and no person shall agree, offer, solicit, or attempt to do any of the foregoing. The provisions of this Revised Maximum Price Regulation No. 169 shall not be applicable to sales or deliveries of veal carcasses or veal wholesale cuts if, prior to April 3, 1943 such veal carcasses or veal wholesale cuts have been received by a carrier other than a carrier owned or controlled by the seller, for shipment to such purchaser. "Person," "veal carcass," and "veal wholesale cut" are defined in § 1364.70.

(c) *Processed products.* On and after December 16, 1942, regardless of any contract, agreement, or other obligation, no person shall sell or deliver any processed product and no person shall buy or receive any processed product at a price higher than the maximum price permitted by § 1364.476; and no person shall agree, offer, solicit, or attempt to do any of the foregoing. "Person" and "processed product" are defined in § 1364.477.

§ 1364.455 *Definitions applicable to beef.* (a) When used in this Revised Maximum Price Regulation No. 169 and when applicable to beef, the term:

* * * * *

(8) *"Beef carcass"* means and is limited to the dressed carcass, side, or sides of beef, which shall be dressed with the 1st and

2nd tail (caudal) vertebrae, kidney knob or knobs, and hanging tender left on. The beef carcass shall not be broken in any other manner than provided in paragraph (a) (9) of this § 1364.455.

§ 1364.477 *Definitions applicable to processed products.* (a) When used in this Revised Maximum Price Regulation No. 169 and when applicable to processed products the term:

* * * * *

(3) "Processed products" means ground, cured, pickled, spiced, smoked, dried, or otherwise processed beef and/or veal, including ground hamburger and sausage containing any proportion of beef or veal: *Provided,* That any beef carcass, or cut thereof, including any beef wholesale cut which has been boned as permitted in subpart B of this Revised Regulation or otherwise, or any veal carcass, or cut thereof, including any veal wholesale cut which has been boned as permitted in subpart C of this Revised Regulation or otherwise shall not be deemed a processed product. Products of each grade and brand, and in each stage of processing, shall be considered separate processed products. Each type of canned and packaged meat, made entirely from beef and/or veal shall be considered a separate processed product. Kosher processed products shall for the purposes of § 1364.476 be regarded as separate processed products.

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